Halimatussaadiah v Public Service Commission, Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO R8-21-7 OF 1987
EUSOFF CHIN J
20 JANUARY 1992

Public Servants *— Disciplinary action — Procedure — Whether disciplinary action had been carried out lawfully — Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 orders 24, 26(4) & (5)*

Constitutional Law *— Fundamental liberties — Freedom of religion — Distinction between religious beliefs and religious practices — Whether religious practices contrary to public order, public health or public morality could be restricted — Federal Constitution art 11(1) & (5)*

The plaintiff accepted employment as a clerk with the Government of Malaysia subject to the condition, inter alia, that she would comply with government circulars in respect of work, behaviour and conditions of service. The first defendant ('the PSC') issued a circular in 1985 which prohibited any attire covering a female public servant's face when on duty ('the circular'). The plaintiff had acknowledged seeing the circular. Since 1983, the plaintiff had been dressed in 'purdah', ie she is completely covered except for her eyes. The plaintiff refused to comply with the circular on the ground that as a Muslim, she is required to cover her face. A report was sent to the chairman of the disciplinary board for group C officers, in which group the plaintiff belonged. The chairman, after considering the report on the plaintiff's refusal to comply with the circular, decided under order 24 of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 (hereinafter referred to as GO 'D') that proceedings for dismissal from the public service should be taken against the plaintiff. The chairman of the disciplinary board referred the matter to the PSC. The PSC wrote to the plaintiff requesting her to show cause as to why she should not be dismissed from public service. The plaintiff wrote a lengthy reply. In 1986, the PSC sent the plaintiff a letter dismissing her from public service. The plaintiff applied to the High Court for a declaration against the defendants, inter alia, that her dismissal was unlawful and that the circular had contravened her constitutional right to practise her Islamic religion under art 11(1) of the Federal Constitution. The plaintiff argued that order 24 of GO 'D' had not been complied with; that the name of the person who lodged a complaint or report to the chairman of the disciplinary board was not disclosed to her; and that the PSC should make a finding of guilt before dismissing her.

Held, dismissing the application:

(1) Under order 24 of the GO 'D', disciplinary action against the plaintiff started when a report was made to the disciplinary board.

When the chairman of the board receives such a report, he is not required to convene a board meeting. It is enough if the chairman considered the gravity of the alleged disciplinary offence and decided whether proceedings should be taken with a view to dismissal or not. His decision was not required to be conveyed to the plaintiff or anyone else. The chairman would then refer the matter to the PSC. Accordingly, in this case, order 24 of GO 'D' was complied with.

(2) The GO 'D' does not require the complainant's name to be disclosed to the plaintiff or anyone else. The complainant's name would most probably be disclosed to the plaintiff if the PSC decides to appoint a committee to inquire into the complaint under order 26(5) of the GO 'D'. This matter, however, is left to the wisdom of the PSC wherein the court will not interfere.

(3) Order 26(4) of the GO 'D' does not require the PSC to make a finding of guilt before dismissing the plaintiff. The PSC was only required to decide whether the plaintiff's explanation had exculpated her to the satisfaction of the PSC.

(4) Article 11(1) of the Constitution is intended to protect absolutely the religious beliefs of the people but in exercising religious practices, art 11(5) of the Constitution forbids any act which may lead to public disorder or which may affect public health or public morality.

(5) There is nothing illegal in laying down conditions for clothing to be worn by government officers while at work for the sake of discipline of the service provided the conditions do not militate against public order, morality or health. Accordingly, there should be no objection to the circular on the ground that it was unconstitutional even though the conditions imposed may restrict to some extent the religious practices of the public servant.

[Bahasa Malaysia summary

Plaintif telah menerima pekerjaan sebagai kerani dengan Kerajaan Malaysia tertakluk kepada syarat, antara lain, bahawa beliau akan mematuhi pekeliling kerajaan berkenaan dengan penjalanan kerja, tingkahlaku dan syarat-syarat perkhidmatan. Defendan pertama ('PSC') mengeluarkan satu pekeliling pada tahun 1985 melarang sebarang pakaian yang menutup muka seseorang pengkhidmat awam wanita ketika berkhidmat ('pekeliling itu'). Plaintif mengaku bahawa beliau telah melihat pekeliling itu. Semenjak 1983, plaintif telah berpakaian purdah, iaitu beliau ditutup sepenuhnya kecuali matanya. Plaintif enggan mematuhi pekeliling itu atas alasan bahawa sebagai seorang Islam, beliau dikehendaki menutup mukanya. Satu laporan telah dihantar kepada pengerusi lembaga tatatertib untuk pegawai kumpulan C, dalam kumpulan yang mana plaintif menjadi ahli. Pengerusi tersebut, selepas menimbangkan laporan mengenai keengganan plaintif untuk mematuhi pekeliling itu, membuat keputusan di bawah perintah am 24 Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980 (seterusnya dirujuk sebagai

PA 'D') bahawa prosiding untuk pembuangan kerja daripada perkhidmatan awam harus diambil terhadap plaintif. Pengerusi lembaga tatatertib telah merujuk perkara itu kepada PSC. PSC telah menulis surat kepada plaintif memintanya menunjukkan sebab mengapa dia tidak harus dibuang kerja daripada perkhidmatan awam. Plaintif telah menulis jawapan yang berpanjangan. Dalam tahun 1986, PSC telah menghantar surat kepada plaintif membuangnya daripada perkhidmatan awam. Plaintif telah memohon kepada Mahkamah Tinggi untuk deklarasi terhadap defendan, antara lain, bahawa pembuangan kerja beliau menyalahi undang-undang dan bahawa pekeliling itu telah melanggar hak perlembagaannya untuk mengamal agama Islamnya di bawah perkara 11(1) Perlembagaan Persekutuan. Plaintif berhujah bahawa perintah am 24 PA 'D' tidak dipatuhi; bahawa nama orang yang telah membuat aduan atau laporan kepada pengerusi lembaga tatatertib tidak diberitahu kepada beliau; dan bahawa PSC harus berpendapat bahawa beliau bersalah sebelum beliau dibuang kerja.

Diputuskan, menolak permohonan itu:

(1) Di bawah perintah am 24 PA 'D', tindakan tatatertib terhadap plaintif bermula apabila satu laporan dibuat kepada lembaga tatatertib. Apabila pengerusi lembaga tersebut menerima laporan itu, dia tidak dikehendaki memanggil mesyuarat lembaga berkenaan. Adalah mencukupi jikalau pengerusi itu menimbangkan kegentingan kesalahan tatatertib yang dikatakan itu dan memutuskan sama ada prosiding harus diambil dengan maksud melaksanakan pembuangan kerja atau tidak. Keputusannya tidak dikehendaki disampaikan kepada plaintif atau mana-mana orang lain. Pengerusi itu kemudiannya akan merujuk perkara itu kepada PSC. Oleh kerana itu, dalam kes ini, perintah am 24 PA 'D' telah dipatuhi.

(2) Perintah-perintah am (PA 'D') itu tidak memerlukan nama pengadu diberitahu kepada plaintif atau mana-mana orang lain. Nama pengadu mungkin sekali akan diberitahu kepada plaintif jika PSC memutuskan untuk melantik satu jawatankuasa untuk menyiasat pengaduan di bawah perintah am 26(5) PA 'D'. Perkara ini, akan tetapi, diserahkan kepada kebijaksanaan PSC dalam mana mahkamah tidak akan mencampur tangan.

(3) Perintah am 26(4) PA 'D' tidak memerlukan PSC untuk mendapati plaintif bersalah sebelum membuang plaintif daripada kerja. PSC hanya dikehendaki memutuskan sama ada penjelasan plaintif telah membebaskannya daripada tuduhan itu kepada kepuasan PSC.

(4) Perkara 11(1) Perlembagaan itu bertujuan untuk mempertahankan secara mutlak kepercayaan agama orang tetapi dalam menjalankan amalan agama, perkara 11(5) Perlembagaan itu melarang sebarang perbuatan yang boleh menyebabkan kekacauan awam atau yang boleh menyentuh kesihatan awam atau akhlak awam.

(5) Tidak ada apa-apa yang menyalahi undang-undang dalam membuat syarat tentang pakaian yang harus dipakai oleh pegawai kerajaan semasa bekerja demi tatatertib perkhidmatan asalkan

syarat itu tidak bertentangan dengan ketenteraman awam, akhlak atau kesihatan. Oleh kerana itu, tiada bantahan yang seharus ditimbulkan terhadap pekeliling itu atas alasan bahawa ia menyalahi perlembagaan walaupun syarat yang dikenakan itu boleh menyekat pada setakat yang tertentu amalan agama seseorang pengkhidmat awam.]

[**Editorial Note**: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 01–05–1992.]

Cases referred to

1 *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141; [1982] 1 WLR 1155 (refd)
2 *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 (folld)
3 *Government of Malaysia v Oh Lee Pek Inn Rosalind* [1973] 1 MLJ 222 (refd)
4 *Rajion bin Haji Sulaiman v Government of Kelantan* [1976] 1 MLJ 118 (refd)
5 *Laws v London Chronicle (Indicator) Newspapers Ltd* [1959] 2 All ER 285; [1959] 1 WLR 698 (folld)
6 *State of Bombay v Narsu Appa Mali* AIR 1953 Bom 84 (folld)

Legislation referred to

Federal Constitution arts 11(1), (5), 144(5B), 160
Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 orders 24, 26(4), (5), 33
Public Officers Disciplinary Board Regulations 1972 reg 3(2)

Karpal Singh (*Karpal Singh & Co*) for the plaintiff.
Pritam Singh (Federal Counsel) for the defendants.

Cur Adv Vult

Eusoff Chin J: On 23 February 1973, the Government of Malaysia offered the plaintiff an appointment as a clerk. One of the conditions in the offer letter stated:

> Sepanjang perkhidmatan tuan/puan, tuan/puan akan setiap masa tertakluk kepada Perintah-Perintah Am Kerajaan, Pekeliling-Pekeliling dan lain-lain peraturan mengenai pekerjaan, kelakuan dan syarat-syarat perkhidmatan pegawai-pegawai dalam perkhidmatan awam yang dikeluarkan dari masa kesemasa.
>
> (English translation
>
> In the course of your service, you will be at all times subject to Government General Orders, Circulars and other regulations in respect of work, behaviour and conditions of service of officers in the public service issued from time to time.)

On 18 February 1985, the government issued service circular No 2 of 1985 (hereinafter referred to as 'the circular') on the subject of dress code for government officers.

Paragraph 2.2 of the circular prescribed for lady officers the following dress to be worn when on duty during office hours —

2.2 Pakaian wanita

2.2.1 Pakaian Kebangsaan atau pakaian kaum masing-masing yang sesuai dipakai semasa bekerja. 'Jeans', 'slacks', seluar pendek dan apa-apa pakaian yang menutup muka tidak boleh dipakai semasa bekerja.

(English translation

Women's attire

National Dress or dress of respective races suitably worn at work. Jeans, slacks, shorts and any attire covering the face cannot be worn when on duty.)

When this circular was issued, the plaintiff was working as a clerk at the State Legal Adviser's office in Ipoh. The attention of the plaintiff and the staff of the State Legal Adviser's office was drawn to this circular by the then State Legal Adviser Perak, Encik Ariffin bin Zakaria, when he circulated the circular by his minute as follows:

Semua pegawai & kakitangan,
Pekeliling Perkhidmatan Bil 2 tahun 1985 diedarkan untuk makluman dan tindakan tuan/puan sewajarnya. Sayugia diingatkan bahawa tindakan tatatertib boleh diambil terhadap mana-mana pegawai yang tidak mematuhi pekeliling ini.

tt 'A'
Penasihat Undang-Undang
Negeri Perak

The plaintiff and other staff of the State Legal Adviser's office had initialled this minute acknowledging that they had seen this circular.

The plaintiff was in the habit of wearing 'purdah' while doing work at the office. Even when attending this court hearing, she still wears 'purdah'. The purdah she wears is black in colour, which covers her whole body from the head down to the feet, except for a slit in the face covering, which exposes her two eyes.

Encik Ariffin Zakaria advised the plaintiff to comply with the circular which is that the dress worn by the plaintiff should not cover her face. She refused to comply with this requirement of the circular giving the reason that as a Muslim, she was required by the Quran and hadiths to cover her face. A report reached the State Legal Adviser's headquarters, which is the Attorney General's department in Kuala Lumpur. A senior official of Pusat Islam, Jabatan Perdana Menteri, Dato' Haji Abdul Kadir bin Talib was sent to see the plaintiff in Ipoh. Dato' Kadir went with his wife to advise the plaintiff on the proper dress to be worn by Muslim women. Dato' Kadir advised the plaintiff that in Islam, women are required to cover the whole body except her face, palms and fingers and soles of the feet. In spite of this the plaintiff refused to expose her face while doing her work in the office.

The plaintiff as a clerk was classified as belonging to 'officers in Group C' in the government service. The chairman of the disciplinary board for Group C officers, at the Attorney General's office, having considered the report on the plaintiff's refusal to comply with the circular, decided under

order 24 of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 (hereinafter referred to as GO 'D') that proceedings for dismissal from the public service should be taken against the plaintiff.

Order 24 of the GO 'D' states:

Disciplinary authority to determine nature of offence.

24 In every case of an alleged breach of discipline by any officer except as provided for under General Order 27(a) and (b), the Chairman of the Appropriate Disciplinary Authority shall, in the first instance, before commencing any disciplinary proceeding in the matter, consider whether the breach of discipline complained of is of a nature which merits *a punishment of dismissal* or reduction in rank or a punishment lesser than dismissal or reduction in rank. (Emphasis added.)

The disciplinary board for Group C officers in the government service was established by the Public Officers Disciplinary Board Regulations 1972 (PU(A)48/72) made by the Yang di Pertuan Agong under art 144(5B) of the Federal Constitution. I quote the relevant provisions of this article which are art 144(5B)(i) and (iv):

144(5B)(i) Notwithstanding the provisions of Clause (1) of Article 135 and Article 139 and Article 141A, all the powers and functions of the Public Services Commission or the Education Service Commission established under Article 139 and Article 141A, other than the power of first appointment to the permanent or pensionable establishment, *may be exercised by a board* appointed by the Yang di-Pertuan Agong.

(iv) Where the Yang di-Pertuan Agong has appointed the board under paragraph (i) of this Clause for the purpose of exercising any of the powers or functions referred to under that paragraph, *such power or function shall* so long as it remains a power or function to be exercised by the board, *cease to be exercisable by the said Commission.* (Emphasis added.)

However, reg 3(2) of the Public Services Disciplinary Board Regulations 1972 states:

No Board other than the Board which has Jurisdiction over the officers in Group D shall exercise the disciplinary power of dismissal and reduction in rank.

Because of this reg 3(2), the disciplinary board for Group C officers of the Attorney General's department could not proceed to take disciplinary action against the plaintiff with a view to dismiss the plaintiff from government service, and therefore, the matter had to be referred to the Public Service Commission ('PSC') for further action

The relevant provisions of GO 'D' order 26 are as follows:

Procedure in cases meriting punishment of dismissal or reduction in rank.

26(1) Where *it is represented to*, or *is found by*, the Appropriate Disciplinary Authority that an officer is guilty of unsatisfactory work or misconduct and such work or misconduct, in the opinion of the Disciplinary Authority, merits dismissal or reduction in rank, the provisions of the following paragraphs shall apply.

(2) *The Appropriate Disciplinary Authority shall*, after considering all the available information in its possession that there

A is a prima facie case for dismissal or reduction in rank, *cause to be sent to the officer* a statement in writing, prepared, if necessary, with the aid of the Legal Department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing within a period of not less than fourteen days from the date of
B receipt of the letter a representation containing grounds upon which he relies to exculpate himself.

(4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and
C decide on the dismissal or reduction in rank of the officer. (Emphasis added.)

Accordingly, on 5 August 1986, the PSC issued the following letter to the plaintiff:

Sulit

D Puan Halimatussaadiah bte Haji Kamaruddin

Melalui:
dan
Salinan:

Peguam Negara,
E Jabatan Peguam Negara Malaysia,
Tingkat 11–15, 18–21,
Bangunan Bank Rakyat,
Jalan Tangsi,
50512 Kuala Lumpur.
(up: Y Bhg Dato' Lamin bin Haji Mohd Yunus)

F Puan,

Kenyataan alasan-alasan membuang kerja

Saya memaklumkan iaitu berikutan dengan laporan yang diterima, maka *suruhanjaya ini* sebagai pihak berkuasa tatatertib yang berkenaan *telah membuat keputusan* untuk mengambil tindakan tatatertib dengan tujuan buang kerja
G terhadap puan di bawah Perintah Am 26, Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980 atas pertuduhan berikut:

'Bahawa Puan Halimatussaadiah bte Haji Kamaruddin yang bertugas sebagai pegawai kerani am, Jabatan Penasihat Undang-Undang Negeri Perak, Ipoh telah didapati mulai 18 April 1985 hingga sekarang masih memakai pakaian
H yang menutup muka semasa bekerja di pejabat walaupun ianya bertentangan dengan Pekeliling Perkhidmatan Bil 2 Tahun 1985 sebagaimana yang telah dimaklumkan kepada puan melalui Edaran Penasihat Undang-Undang Negeri Perak bertarikh 18 April 1985. Perbuatan puan itu adalah satu kesalahan yang tidak bertanggungjawab dan engkar perintah atau berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabah *sebagai engkar perintah*
I iaitu bertentangan dengan perintah am 4(2)(g) dan 4(2)(i), Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980.'

2 Mengikut kehendak perintah am 26(2), Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980, puan adalah diminta mengemukakan:

(a) jawapan kepada pertuduhan ini; dan
(b) hujah-hujah sebagai pembelaan diri mengapa tindakan tatatertib buang kerja tidak boleh diambil terhadap puan sekarang.

Jawapan dan hujah-hujah pembelaan diri puan itu hendaklah dikemukakan kepada setiausaha, Suruhanjaya Perkhidmatan Awam melalui ketua jabatan puan dalam tempoh dua puluh (20) hari daripada tarikh puan menerima surat ini. Sekiranya puan tidak memberi sebarang jawapan dalam tempoh masa yang ditetapkan itu, puan akan dianggap sebagai tidak hendak mengemukakan sebarang pembelaan diri dan perkara ini akan diputuskan atas keterangan-keterangan yang ada sekarang ini sahaja.

3 Sila puan akui penerimaan surat ini.

'Berkhidmat untuk negara'
Saya yang menurut perintah,
tt
(Dato' Nik Badli Shah bin Dato' Nik Abdullah)
Setiausaha,
Suruhanjaya Perkhidmatan Awam,
Malaysia.

The plaintiff gave a 21-page reply explaining why she must continue to wear the purdah, quoting verses from the Quran and hadith.

On 16 December 1986, the PSC sent her the following letter dismissing the plaintiff from the service:

Sulit

Puan Halimatussaadiah bte
Hj Kamaruddin,

Ruj Kami: SPA Sulit 80223/3/(30)
Tarikh: 16 Disember 1986
14 Rabiul Akhir 1407

Melalui:
dan
Salinan:

Y Bhg Peguam Negara,
Jabatan Peguam Negara, Malaysia,
Tingkat 11–15, 18–21,
Bangunan Bank Rakyat,
Jalan Tangsi,
50512 Kuala Lumpur.

Puan,

Keputusan Lembaga Tatatertib Suruhanjaya Perkhidmatan Awam

Saya diarah menarik perhatian kepada surat suruhanjaya ini bil SPA Sulit 80223/3/(16) bertarikh 5 August 1986 meminta puan mengemukakan hujah-hujah bagi membebaskan diri puan daripada tindakan tatatertib dengan tujuan buang kerja yang akan diambil ke atas puan di bawah Perintah Am 26, Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980. Puan telah mengemukakan jawapan sebagai pembelaan diri menerusi surat puan bertarikh 30 August 1986.

2 Dimaklumkan bahawa Suruhanjaya Perkhidmatan Awam dalam mesyuaratnya yang telah diadakan pada 10 November 1986 setelah menimbangkan dengan

teliti kes puan itu pada keseluruhannya telah memutuskan bahawa puan dikenakan hukuman buang kerja berkuatkuasa dengan serta-merta.

'Berkhidmat untuk negara'
Saya yang menurut perintah,
tt
(Farizan bin Darus)
Bahagian Naik Pangkat/Tatatertib,
bp Setiausaha,
Suruhanjaya Perkhidmatan Awam,
Malaysia.

On 26 October 1987, the plaintiff filed this application seeking the following reliefs:

(i) a declaration that para 2.2.1 of Service Circular No 2 of 1985 which in effect prohibits the wearing of the purdah is null and void in contravention of art 11(1) of the Federal Constitution;
(ii) a declaration that the plaintiff's purported dismissal from service is null and void, inoperative and of no consequence;
(iii) a declaration that the plaintiff is still a member of the general public service of the Federation;
(iv) an order that the plaintiff be reinstated on the scale of salary she is lawfully entitled to;
(v) an order that an account be taken of all salaries, emoluments and other benefits lawfully due to the plaintiff from the date of her purported dismissal and same be paid to her;
(vi) interest at the rate of 6% pa on the adjudged sum from date of judgment to date of realization;
(vii) costs; and
(viii) any further or other relief deemed fit and proper by the honourable court.

The grounds of the application are:

(a) The plaintiff contends there were material irregularities in the procedure adopted by the first defendant in attempting to initiate disciplinary proceedings against the plaintiff in that the first defendant should have stated the grounds upon which it was intended to take disciplinary action and not preferred a charge against the plaintiff as contained in the show cause letter dated 5 August 1986. There is no such thing as requesting a public officer to show cause why disciplinary proceedings should not be taken against him. Disciplinary proceedings had in fact already commenced when it was decided to proceed against the plaintiff under reg 26(1). The plaintiff further pleads that due to the said material irregularities mentioned hereinbefore she was absolved from having to reply to the said show cause letter.
(b) The ground upon which the plaintiff's purported dismissal is based is in contravention of the plaintiff's constitutional right to practice the Islamic religion as contained in the Quran, hadith and the teaching of the Ulamak and Hukama Islam. The plaintiff pleads her use of the purdah during office hours did not conflict with her duties.
(c) The first defendant has failed to comply with the mandatory provisions of general order 24 of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980.

(d) The first defendant has breached the rules of natural justice in failing to inform the plaintiff of the complainant against her.
(e) Paragraph 2.2.1 of the Service Circular No 2 of 1985 is vague and uncertain.
(f) The first defendant has failed to make a finding of guilt before imposing the punishment of dismissal, which is procedurally defective.

In *Chief Constable of North Wales Police v Evans*,[1] the House of Lords held:

> Judicial review is not an appeal from a decision but a review of the manner in which the decision was made, and, therefore, the court is not entitled on an application for judicial review to consider whether the decision itself was fair and reasonable.
>
> Judicial review is concerned, not with the decision, but with the decision-making process. Unless the restriction on the power of the court is observed, the court will in my view under the guise of preventing the abuse of power, be itself guilty of usurping power.

As regards the framing of the charge and grounds of dismissal to be given under GO 'D', it was held by the Supreme Court in *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor*,[2] at p 366 as follows:

> The use of a charge in disciplinary actions under reg 30(2) concerns matters of form rather than substance and in our view the reference to a charge in the show cause letter did not in any way place the appellant in any disadvantageous position nor was she in any way prevented from furnishing the first respondent with the written representation. In any event, the charge contained all the necessary grounds for the proposed dismissal which enabled the appellant to prepare her written representation accordingly. We did not think this trivial departure was serious enough as to vitiate the decision of the first respondent and render it void and inoperative.

Encik Karpal Singh for the plaintiff submitted that the appropriate disciplinary authority had failed to give effect to the provision of order 24 of GO 'D'. He further submitted that in this case the chairman of the PSC should consider the complaint under this order 24 first. He made a reference to the definition of the words 'disciplinary authority' contained in order 3 of GO 'D', which states as follows:

> 'Disciplinary authority' means the appropriate Service Commission whose jurisdiction extends to the service of which the said officer is a member in accordance with the provisions of Part X of the Constitution, and *includes an officer or a board of officers* in the public service by whom the Commission's function relating to disciplinary control is exercisable in pursuance of Clauses (5A), (5B) or (6A) of Article 144 of the Constitution. (Emphasis added.)

I note that the chairman of the disciplinary board for 'officers in Group C' in the Attorney General's Chambers who is the Attorney General himself, as provided under para 1(v) of the Regulations, had already made a decision under order 24 of GO 'D' that this was a case which merited a disciplinary action with a view to dismissal. Since the definition of 'disciplinary authority' includes 'a board of officers' appointed by the Yang di-Pertuan Agong under cl (5B) of art 144 of the Federal Constitution, I find the provision of order 24 of GO 'D' was sufficiently complied with when a letter dated 24 August 1985 addressed to the secretary of the PSC signed

by the administrative officer in the Attorney General's department under direction to convey that decision made under order 24 of the GO 'D', para 1 of which stated:

> Saya adalah diarah dengan hormatnya memaklumkan bahawa jabatan ini ada menerima laporan bahawa Cik Halimatussaadiah bte Hj Kamaruddin, pegawai kerani am di Pejabat Penasihat Undang-Undang Negeri Perak, Ipoh, Perak, telah melanggar peraturan pakaian semasa bekerja sebagaimana ditetapkan di bawah Pekeliling Perkhidmatan Bil 2 Tahun 1985. Setelah meneliti laporan tersebut dan semua maklumat yang berkaitan, *maka Pengerusi Lembaga Tatatertib Jawatan Kumpulan 'C'*, Jabatan Peguam Negara, berpuashati bahawa pegawai ini seharusnya dikenakan tindakan tatatertib dengan tujuan buang kerja. (Emphasis added.)

The reason why this disciplinary board for officers in Group C sent this request to the PSC is because the board under reg 3(2) of the Regulations did not have the power of dismissal. Nevertheless, the chairman of the disciplinary authority (or the board) had complied with order 24 of GO 'D'. The disciplinary action against the plaintiff started when a report was received by the disciplinary board for Group C officers whose chairman, having considered the report, was of the view that the breach of disciplinary offence committed by the plaintiff merited the punishment of dismissal and the subsequent action of the PSC is a continuation of the action begun by the disciplinary board for officers in Group C of the Attorney General's Chambers. In any event the chairman of the PSC must have decided this question under order 24 of the GO 'D' or else there would have been no further proceedings taken against the plaintiff by the PSC. His decision under order 24 of GO 'D' is not required to be conveyed to the plaintiff or to any one else. The purpose of order 24 of the GO 'D' is quite clear. When the chairman of the appropriate disciplinary board receives the report, he is not required to convene the board meeting. It is enough that he considers the gravity of the alleged disciplinary offence committed, and decides whether under the circumstances, proceedings should be taken with a view to dismissal or not. For these reasons, Encik Karpal Singh's argument on this issue must fail.

Encik Karpal Singh raised the issue that the name of the officer or person who lodged a complaint or report to the disciplinary board for officers in Group C in the Attorney General's Chambers was never disclosed to the plaintiff. With respect, I do not agree that this is the requirement of order 26 of the GO 'D'. The opening words of this order 26 states: 'Where it is represented to, or is found by the disciplinary authority ...'. Nowhere is found in the GO 'D' that the name of the complainant is required to be disclosed to the plaintiff or to anyone else. Most probably, the name of the complainant would be disclosed to the plaintiff if the PSC decided to appoint a committee to inquire into the complaint under order 26(5) of the GO 'D'. But this is a matter left to the wisdom of the PSC to decide, and if the PSC decided not to appoint such a committee, the court shall not interfere with this decision.

As regards the issue of 'finding of guilt' of the plaintiff before the PSC imposed the punishment of dismissal, I think it is perfectly clear that order 26(4) of the GO 'D' does not require the PSC to make such finding. What

the PSC is required to decide is whether the explanation given by the plaintiff, had exculpated the plaintiff to the satisfaction of the PSC.

On the issue that para 2.2.1 of the circular prohibited any dress 'yang menutup muka' (which covers the face), Encik Karpal Singh submitted that what is prohibited is a dress which completely covers the whole face, which he thought was a reasonable requirement since the public officer concerned would not be able to perform her work because with the eyes covered, she would not be able to see. He argued that in the case of the plaintiff, she exposed her two eyes through a slit in the face covering and because of that she could still perform her duties in the office. Encik Karpal Singh, therefore, was of the view that the plaintiff did not cover her face completely and consequently did not contravene the provision of this circular.

Encik Karpal Singh conceded that on authorities, *Government of Malaysia v Oh Lee Pek Inn Rosalind*[3] and *Rajion bin Hj Sulaiman v Government of Kelantan*,[4] the contract between a public servant and the government is of a special kind, as once appointed the government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute, statutory rules or administrative rules made by the government. But he said that the provision of para 2.2.1 of the circular is vague and certainly did not refer to purdah. Encik Pritam Singh for the defendants submitted that a face comprises the temple, eyes, nose, mouth, cheek and chin of a person, and that the covering of any of these parts of the face is prohibited. I tend to agree with the view taken by Encik Pritam Singh. DW1, Encik Wan Ibrahim bin Wan Ahmad, Deputy Director, Service Division in the Public Services Department who was involved in the issuance of this circular said that the intention of para 2.2.1 is that a woman officer must expose her entire face. The circular uses the words 'pakaian yang menutup muka tidak boleh dipakai ...' which means that the face, must not be covered. Therefore, if any part of the face, eg the eyes, or the nose or mouth is exposed, while the rest of the face is covered, I would say that the circular has not been complied with.

It was held in *Laws v London Chronicle (Indicator) Newspapers Ltd*[5] that the wilful disobedience of a lawful and reasonable order is itself a ground for dismissal as it is settled law that an employee repudiates his contract of service if he wilfully disobeys the lawful and reasonable order of his employer. Disobedience is a deliberate flouting by a servant, and that in itself justifies dismissal.

That brings the issue of whether the directive contained in para 2.2.1 prohibiting the wearing of a dress covering the face is lawful and reasonable. Article 11(1) of the Federal Constitution states:

> Freedom of religion. 11(1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.

The plaintiff said in evidence that since 1983 she had been wearing the purdah which covered the face except for the eyes. She admitted that Surah AnNur, ayat 30 and 31 of the Quran, and hadiths require that the whole body of a woman must be covered except for the forehead, eyes, nose, mouth, cheek and chin; in other words the face. However, in her interpre-

tation of the Quran and hadith she believed that the face, except the eyes must also be covered to avoid 'fitnah'.

The Dato' Mufti Wilayah Persekutuan Dato' Haji Abdul Kadir bin Talib (herein referred to as Dato' Mufti) who holds a Master in Islamic Studies, Azhar University, and who has held posts as Pegawai Ugama Negeri Johor, lecturer in Islamic studies at University Kebangsaan, Deputy Director Pusat Islam in Jabatan Perdana Menteri and Pakar Rujuk Hal Ehwal Islam dan Dakwah at Pusat Islam, and since 21 March 1991, the post of the Mufti for Wilayah Persekutuan, agreed that the Quran requires a Muslim woman to cover her body except the face, palms and fingers, and feet. Where a woman's face is painted with cosmetics to make her exceptionally beautiful and attractive so that it evokes a sexual desire on all men who behold her beautiful face, which would invite 'fitnah', and which in turn may cause a breach of the peace or lead to public disorder, then the woman is obliged to cover her face and should only expose her face to members of her family. She is allowed to use make-up to beautify her face for her husband. Whether the woman's face is exceptionally beautiful is not for the woman herself to judge. The Dato' Mufti gave this fatwa after making references to the verses in the Quran, hadiths and kitabs in Arabic and in Bahasa Malaysia. According to him Muslim women in Malaysia are not required to cover their faces, and as far as he could remember, none of them ever covered their faces until recently when Arqam leaders started telling their young wives and encouraged their women followers to cover their faces. The Dato' Mufti gave evidence that purdah was a customary dress worn by old Arab ladies even before the beginning of Islam. But the religion of Islam does not prohibit a Muslim woman from wearing, nor requires her to wear a purdah. According to him, the Quran does not anywhere mention 'purdah'. The Quran, on the other hand, expressly prohibits a Muslim woman who performs the tawaf (ceremonial walking round the Kaabah) or while praying, from covering her face.

It is in evidence that before submitting the circular for approval by the Cabinet, the Public Services Department had referred this question to the Pusat Islam in the Prime Minister's Department for an opinion, and the Pusat Islam had replied that the terms of para 2.2.1 of the circular prohibiting women officers from covering their faces while on duty, was not against the practice and teachings of Islam in this country.

The learned Dato' Mufti stated in evidence that as a Mufti, he issues fatwa on any religious issue, and if on any issue he considered it necessary to get further opinions, he would seek the views of the fatwa committee of which he is the chairman. But in this case, he is certain of his opinion that in Islam, the dress to be worn by a Muslim woman would be as he had told the court. He of course was willing to give his fatwa on this issue in writing, but I did not consider it necessary that he should do so since he was already in the witness stand, and had answered questions put to him without hesitation and further, he had produced to the court the authorities on which he relied and based his opinions which are the relevant verses from the Quran, Sunnah, Ijma and the views of early imams and jurists both in Arabic and Bahasa Malaysia. The Dato' Mufti has spent his whole life in

the study and teaching of, and interpreting the Islamic law. At the moment, there is no written law laying down the apparel to be worn by Muslim women. I have myself read the authorities produced by him to the court, and I know of no compelling reason why I should reject the views expressed by Dato' Haji Abdul Kadir who now is regarded as the highest Islamic authority in the Wilayah Persekutuan of Kuala Lumpur. DW5 Encik Abdullah Fahlim, Ketua Pengarah Hal Ehwal Ugama Islam in Jabatan Perdana Menteri was of the same view as the Dato' Mufti as regards the proper dress to be worn by Muslim women. Even the plaintiff's own witness No 2, Tuan Haji Hassan bin Haji Salleh is of the same view as expressed by the Dato' Mufti. I therefore accept the opinions expressed by the Dato' Mufti in this court.

In the *State of Bombay v Narsu Appa Mali*,[6] Chagla CJ stated:

> Now a sharp distinction must be drawn between religious faith and belief and religious practices. What the state protects is religious faith, and belief. If religious practices run counter to public order, morality or health ... then the religious practices must give way before the good of the people of the state as a whole.

Article 11(5) of the Federal Constitution states: 'This Article does not authorise *any act* contrary to *any general law* relating to public order, public health or public morality.'

The language of art 11 of the Federal Constitution clearly shows that the article is intended to protect absolutely the religious beliefs of the people but in exercising religious practices, art 11(5) also clearly forbids any act which may lead to public disorder, affect public health or public morality. The words used in art 11(5) is not 'written law' but 'general law'. The word 'law' has been defined under art 160 of the Federal Constitution to include any custom or usage having the force of law in the Federation or any part thereof. It was stated in evidence by Dato' Ariffin bin Zakaria that the office of the State Legal Adviser Perak deals with files relating to government secrets, the handling of which is governed by the Official Secrets Act 1972 (Act 88). The identity of a person wearing the purdah is difficult to determine. The Dato' Mufti when called upon to identify the plaintiff in court was unable to do so because he said it was impossible for him to identify the plaintiff by just looking at the eyes, and when this question was put to him, there were three persons in court wearing the purdah. If, therefore, the purdah is allowed to be worn by lady officers during office hours, a stranger or person who is not an officer at a particular government office may enter that office wearing a purdah and, pretending to be a lady officer working in that office, handle secret files kept there, which can certainly lead to dangerous and disastrous results. Government secrets and governmental interests must be safeguarded and protected at all costs. Although government employees are required to wear name tags, the wearing of a name tag does not reflect the true identity of a purdah wearer. The purdah wearer could even be a man with false breasts and having a small kuali tied at his belly to represent a pregnant lady, and none in the office would be able to discover his true identity.

I find that there is nothing illegal in the government's laying down conditions for clothing to be worn by government officers while at work for

the sake of discipline of the service, provided the conditions do not militate against public order, morality or health. In other words, so long as the conditions imposed do not violate ethical principles or do not subvert public order, morality or health which include those of its officers, there should be and can be, no objection to the government's imposing such conditions on the ground that the conditions imposed are unconstitutional. This is so even though the conditions imposed may restrict to some extent, the religious practices of some of its officers.

Under the circumstances, I hold that the terms of para 2.2.1 of the circular is indeed lawful and reasonable and must be obeyed. Disobedience by an officer to such lawful and reasonable directive or order of the government would justify the taking of disciplinary action against him or her by the appropriate disciplinary authority.

I therefore dismiss the plaintiff's application with costs.

Application dismissed.

Reported by Wong Kian Kheong